

# **Appendix B426-B500**

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16:34:19 1 Castle Pines, ClinCorp, US Wireless?  
16:34:24 2 A. No, none of those.  
16:34:29 3 Q. New America securities litigation?  
16:34:42 4 A. No.  
16:34:42 5 Q. Zelcor, American Dental, Shearson?  
16:34:49 6 A. I can't recall.  
16:34:50 7 Q. Alpha Group, Kenny or Mackinley?  
16:34:59 8 Those are the other ones we talked about.  
16:35:01 9 A. It wasn't Alpha Group. No, I don't  
16:35:05 10 recall.  
16:35:05 11 Q. But you do recall that AMF Bowling  
16:35:08 12 was the other one?  
16:35:09 13 A. Yes.  
16:35:09 14 Q. The AMF report, which we'll mark in  
16:35:19 15 a minute, was a model or a template for the section of  
16:35:23 16 your report in this matter beginning with Paragraph 19  
16:35:26 17 that dealt with the underwriters' due diligence; is  
16:35:30 18 that correct?  
16:35:30 19 MR. LEWIS: Objection to form and  
16:35:32 20 foundation.  
16:35:33 21 THE WITNESS: I don't know that I'd  
16:35:35 22 put it quite as broadly. I think with  
16:35:38 23 respect to the type of information that was  
16:35:41 24 required by prospective underwriters, the  
16:35:47 25 type of information relevant to that

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16:35:50 1 examination, process issues as to how the  
 16:35:52 2 underwriter should go about the work, what  
 16:35:55 3 level of detail to obtain, factors that are  
 16:35:58 4 important in conducting the work. In those  
 16:36:04 5 source of factors, I used some of the  
 16:36:07 6 language which I also used in AMF Bowling as  
 16:36:11 7 it applied to this case but reviewing it to  
 16:36:14 8 make sure that it did apply to this case and  
 16:36:17 9 modifying it if necessary.  
 16:36:20 10 Again, some of the work here has  
 16:36:23 11 been generated over the years from reviewing  
 16:36:26 12 Mr. Haft's series, the due diligence and  
 16:36:32 13 securities transaction materials, and other  
 16:36:35 14 publications and materials that we get  
 16:36:38 15 regularly on due diligence issues.  
 16:36:43 16 MR. GLUCKOW: Let's mark your  
 16:36:45 17 initial report of AMF Bowling.  
 16:37:24 18 (Mr. Miller's AMF Report was marked  
 16:37:24 19 Exhibit-351 for identification.)  
 16:37:25 20 BY MR. GLUCKOW:  
 16:37:25 21 Q. Mr. Miller, you have 351, which is  
 16:37:27 22 your initial report in AMF. Do you recognize that as  
 16:37:32 23 your initial report in the AMF Bowling matter?  
 16:37:36 24 A. Yeah, it appears to be that.  
 16:37:37 25 Q. If you would, compare Paragraphs 19

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16:37:40 1 and 20 from the Adams Golf initial report with  
16:37:48 2 Paragraphs 6 and seven of the AMF Bowling report.  
16:38:28 3 A. Right.  
16:38:28 4 Q. They are very similar, correct?  
16:38:30 5 A. Yeah, many of the bullet points are  
16:38:33 6 the same. There are a couple that differ given the  
16:38:36 7 differing nature of the two companies involved in  
16:38:39 8 these two matters.  
16:38:42 9 Q. The introductory language in 19 in  
16:38:47 10 the Adams Golf report is the same as the introductory  
16:38:50 11 language in six of the AMF report, correct?  
16:39:02 12 A. Yes.  
16:39:02 13 Q. The first bullet point is the same?  
16:39:05 14 A. Right.  
16:39:05 15 Q. The second bullet point is the same?  
16:39:08 16 A. Yes.  
16:39:10 17 Q. The third bullet point is the same?  
16:39:12 18 A. Yes.  
16:39:13 19 Q. The fourth bullet point is the same?  
16:39:16 20 A. Yes.  
16:39:16 21 Q. The fifth bullet point in Adams Golf  
16:39:20 22 is new, correct?  
16:39:25 23 A. Correct.  
16:39:26 24 Q. Do you recall the process that led  
16:39:28 25 to the adding of that bullet point and, specifically,

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16:39:35 1 did you think to add that yourself or was that a  
16:39:38 2 suggestion from counsel or someone else?  
16:39:39 3 A. No, that was my input, and it  
16:39:49 4 reflects the various -- the differing stages of the  
16:39:52 5 two companies; that is, AMF Bowling was a more  
16:39:55 6 established, longer term company and Adams was a new,  
16:40:00 7 fast-growing company with comparatively inexperienced  
16:40:06 8 management, particularly in the public company arena,  
16:40:09 9 and with a rapidly evolving business plan, so it was  
16:40:14 10 an appropriate one for Adams that didn't apply so much  
16:40:17 11 to AMF.  
16:40:18 12 Q. The next bullet point is the same,  
16:40:18 13 correct?  
16:40:22 14 A. Correct.  
16:40:22 15 Q. The next one is the same after that?  
16:40:26 16 A. Correct.  
16:40:29 17 Q. Then the -- I think the report of  
16:40:41 18 Gerard Adams I read somewhere was a typo in your AMF  
16:40:46 19 report, so we'll ignore that one.  
16:40:48 20 MR. LEWIS: Objection to form.  
16:40:50 21 BY MR. GLUCKOW:  
16:40:50 22 Q. The two paragraphs that follow the  
16:40:52 23 list of bullet points --  
16:40:56 24 A. Continuing through the bullet points  
16:40:58 25 after you left off there, the next one is different,

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16:41:04 1 the next one is different.

16:41:06 2 Q. Which one did you say was different?

16:41:08 3 A. The one that begins historical

16:41:13 4 financial performance and trends.

16:41:13 5 Q. The first sentence is the same,

16:41:15 6 correct?

16:41:15 7 A. The first sentence is the same. In

16:41:17 8 Adams, I've added a sentence that relates to Adams'

16:41:22 9 specific situation versus AMF's. The next bullet

16:41:26 10 point in the AMF does not appear in Adams, the next

16:41:31 11 bullet point is the same, and the report of Gerard

16:41:35 12 Adams we've talked about.

16:41:38 13 Q. The next paragraph which begins in

16:41:40 14 both reports with respect to each of is the same,

16:41:46 15 correct?

16:41:56 16 MR. LEWIS: Off the record.

16:41:56 17 (Discussion held off the record.)

16:41:56 18 (Recess.)

16:50:54 19 (Mr. Rozen leaves the deposition.)

16:50:54 20 BY MR. GLUCKOW:

16:51:29 21 Q. Mr. Miller, have you had a chance to

16:51:31 22 look at those paragraphs we were considering before

16:51:34 23 the break?

16:51:34 24 A. Yes.

16:51:35 25 Q. As best I can tell, they are the

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16:51:37 1 same except in the paragraph that begins the proper  
16:51:40 2 attitude in Adams Golf, instead of a period after  
16:51:46 3 issuer, there's a comma, and then there's a clause  
16:51:50 4 particularly with respect to a new company  
16:51:51 5 experiencing substantial and rapid growth, which is  
16:51:54 6 additional language in Adams Golf that's not in  
16:51:58 7 AMF Bowling, correct?  
16:51:59 8 A. Correct.  
16:51:59 9 Q. Otherwise, they are the same,  
16:51:59 10 correct?  
16:52:01 11 A. Correct.  
16:52:02 12 Q. In the AMF report, specifically in  
16:52:08 13 Paragraph 9, you actually offer an opinion that the  
16:52:15 14 due diligence investigation with respect to the public  
16:52:19 15 offering was inadequate, correct?  
16:52:24 16 MR. LEWIS: Objection to form; it  
16:52:26 17 speaks for itself.  
16:52:34 18 THE WITNESS: Yeah, in Paragraph 9  
16:52:37 19 of AMF, yeah, I give the opinion that the due  
16:52:40 20 diligence investigation and pricing analysis  
16:52:45 21 conducted by the QIU was inadequate.  
16:52:53 22 BY MR. GLUCKOW:  
16:52:53 23 Q. Were you finished?  
16:52:54 24 A. Yes.  
16:52:54 25 Q. As we've discussed in the Adams Golf

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16:52:59 1 report, in your initial report you did not offer any  
16:53:03 2 opinion regarding the adequacy or the inadequacy of  
16:53:06 3 the underwriters' due diligence and instead awaited  
16:53:10 4 receipt of the defendants' information, correct?

16:53:12 5 MR. LEWIS: Objection to the form.

16:53:13 6 THE WITNESS: Yes, except with  
16:53:15 7 respect to the disclosure and the prospectus  
16:53:19 8 issue, which I do address in the initial  
16:53:21 9 report in Adams Golf.

16:53:22 10 BY MR. GLUCKOW:

16:53:22 11 Q. You're referring to Paragraph 22 of  
16:53:24 12 Adams Golf?

16:53:24 13 A. Yes.

16:53:24 14 Q. Just so I'm clear, that  
16:53:27 15 Paragraph 22, which I recognize is your opinion, in  
16:53:31 16 the initial report does not address the adequacy or  
16:53:36 17 the inadequacy of the underwriters' due diligence  
16:53:40 18 investigation, correct?

16:53:42 19 A. It doesn't address it separate from  
16:53:45 20 the publication in the prospectus of the information  
16:53:49 21 at issue; that's correct. Again, I discussed that  
16:53:54 22 topic a few minutes ago before the break. It does not  
16:53:59 23 discuss the investigation itself separate from the  
16:54:03 24 publication in the Adams Golf Paragraph 22.

16:54:07 25 Q. I just have to make sure I

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16:54:09 1 understand this correctly. Twenty-two is saying that  
16:54:11 2 it's your opinion that the disclosure in the  
16:54:13 3 prospectus was inadequate in the area of gray  
16:54:17 4 marketing and the effect that might have on the  
16:54:20 5 company, correct?

16:54:21 6 A. Right; right.

16:54:21 7 Q. There's nothing in 22 that addresses  
16:54:23 8 -- or anywhere else in the initial report that  
16:54:25 9 addresses whether the underwriters' due diligence  
16:54:30 10 investigation was or was not adequate, correct?

16:54:33 11 MR. LEWIS: Objection to the form  
16:54:34 12 and foundation.

16:54:36 13 THE WITNESS: There's nothing else  
16:54:37 14 that addresses that; that's correct. Having  
16:54:39 15 said that, I don't believe that you can, on a  
16:54:43 16 practical basis, have an adequate and  
16:54:47 17 reasonable underwriters' due diligence  
16:54:50 18 investigation resulting in the nonpublication  
16:54:52 19 in the prospectus of the information that's  
16:54:56 20 at issue.

16:54:59 21 BY MR. GLUCKOW:

16:54:59 22 Q. Are you taking away the due  
16:55:01 23 diligence defense from the underwriters? I'm not  
16:55:04 24 following you.

16:55:04 25 MR. LEWIS: Objection to form.

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16:55:06 1 THE WITNESS: I don't think so.

16:55:07 2 That is, if the underwriter performs a

16:55:13 3 reasonable and adequate due diligence

16:55:15 4 investigation and discovers a problem, and it

16:55:17 5 does not then put in the prospectus, or

16:55:20 6 insist be put in the prospectus, I don't

16:55:22 7 believe he has conducted his necessary

16:55:25 8 reasonable and adequate due diligence

16:55:28 9 investigation to afford him the defense. It

16:55:31 10 just doesn't make any sense that that would

16:55:33 11 be the case, so with respect to the

16:55:36 12 publication part of that function, my

16:55:40 13 Paragraph 22 addresses that. It does not

16:55:43 14 address separately whether or not the

16:55:45 15 investigation part of the function was

16:55:46 16 performed adequately or reasonably in this

16:55:50 17 case.

16:55:51 18 BY MR. GLUCKOW:

16:55:51 19 Q. Everything you just said is based on

16:55:55 20 what, because you're not a lawyer, right?

16:55:58 21 A. That's correct.

16:55:58 22 Q. You have no legal training, haven't

16:56:01 23 gone to law school?

16:56:03 24 A. I don't have legal training. I have

16:56:06 25 not gone to law school. I have obviously read the

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16:56:10 1 Securities Act a number of times, read and reviewed  
16:56:12 2 and attended PLI materials and that sort of thing, but  
16:56:16 3 my expertise in the area is as I discussed before, in  
16:56:20 4 the context of the investment banking and investment  
16:56:23 5 community's understanding of these matters.

16:56:25 6 Q. I just want to make sure --  
16:56:28 7 A. I also -- sorry -- further in that  
16:56:31 8 area have reviewed case law and opinions and that sort  
16:56:34 9 of thing in this area as well.

16:56:39 10 Q. I'm just going to do this  
16:56:42 11 hypothetically to find out whether I can understand  
16:56:45 12 what you are saying.

16:56:46 13 Assume that there's a prospectus  
16:56:49 14 that's defective, it has a misstatement or an omission  
16:56:53 15 in it, a material misstatement or omission, and also  
16:56:55 16 assume that the underwriters have conducted a  
16:56:57 17 reasonable due diligence investigation where they've  
16:57:00 18 identified an issue, and they actually believe and  
16:57:07 19 have reasonable grounds to believe that the  
16:57:09 20 registration statement and prospectus are complete and  
16:57:13 21 accurate, don't have any material misstatements, don't  
16:57:17 22 omit any material facts; you do recognize, I take it,  
16:57:20 23 that in that circumstance the underwriters are  
16:57:23 24 entitled to a due diligence defense even if the  
16:57:26 25 prospectus is defective, correct?

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16:57:29 1 MR. LEWIS: Objection to form,  
16:57:29 2 foundation, incomplete hypothetical,  
16:57:29 3 argumentative.  
16:57:33 4 BY MR. GLUCKOW:  
16:57:33 5 Q. I'm not trying to be argumentative,  
16:57:36 6 I'm just trying to understand.  
16:57:39 7 A. I think not necessarily, I guess, is  
16:57:41 8 the answer. I think that -- let me put it this way if  
16:57:47 9 I can -- if I understand what you're asking, I believe  
16:57:49 10 it is possible for underwriters to conduct a  
16:57:52 11 reasonable and adequate due diligence investigation  
16:57:56 12 and still be misled or defrauded in certain  
16:58:03 13 circumstances, but I don't believe those circumstances  
16:58:14 14 exist here, and at the time I prepared my initial  
16:58:22 15 report I was prepared to say what I did in  
16:58:24 16 Paragraph 22 but awaited the report of the defendants'  
16:58:32 17 expert to see if they then established that they had  
16:58:35 18 performed a reasonable and adequate due diligence  
16:58:37 19 investigation, notwithstanding the omission from the  
16:58:42 20 prospectus of what I considered to be material  
16:58:45 21 information.  
16:58:45 22 Q. Let's assume that the report that  
16:58:49 23 you then received from the defendants established a  
16:58:52 24 reasonable and adequate due diligence investigation.  
16:58:56 25 Okay?

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16:58:56 1 A. Right.  
16:58:57 2 Q. You would then agree that the  
16:58:59 3 underwriters could take advantage of their affirmative  
16:59:04 4 defense, correct?  
16:59:05 5 MR. LEWIS: Objection as to  
16:59:09 6 foundation, incomplete hypothetical, vague  
16:59:10 7 and indeterminate.  
16:59:12 8 THE WITNESS: Yeah, if I understand  
16:59:13 9 your question correctly, I think that's a  
16:59:18 10 possibility.  
16:59:18 11 BY MR. GLUCKOW:  
16:59:18 12 Q. They could still be entitled to  
16:59:20 13 their due diligence defense, notwithstanding your  
16:59:24 14 opinion in 22 that there was a problem with the  
16:59:27 15 prospectus, correct?  
16:59:28 16 MR. LEWIS: Objection to form.  
16:59:29 17 THE WITNESS: I think that that is  
16:59:30 18 possible, yes.  
16:59:32 19 BY MR. GLUCKOW:  
16:59:32 20 Q. We may have to come back to that  
16:59:38 21 later but let's leave it there for now.  
16:59:44 22 A. Just to be clear, I view that as a  
16:59:47 23 hypothetical question. Having been through this  
16:59:49 24 process so far in this case, I don't believe it  
16:59:52 25 occurred.

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16:59:53 1 Q. You don't believe there was a  
16:59:54 2 reasonable investigation by the underwriters?  
16:59:57 3 A. Right. I don't believe there was  
16:59:59 4 one and I don't believe the defendants have  
17:00:01 5 established that there was one. Maybe I should do  
17:00:05 6 that in reverse order. I don't believe -- perhaps  
17:00:08 7 more importantly, I don't believe defendants have  
17:00:10 8 established they performed such an investigation.  
17:00:14 9 From what I have seen, I also believe they have not  
17:00:17 10 performed such investigation.  
17:00:18 11 Q. The first point that you just made,  
17:00:21 12 which is your point that in your view the underwriters  
17:00:26 13 have not established that they conducted a reasonable  
17:00:31 14 investigation, as we'll see, that opinion is in your  
17:00:34 15 rebuttal report, correct?  
17:00:35 16 A. Right.  
17:00:36 17 Q. The other opinion that you just  
17:00:38 18 articulated, which is that you have an opinion that,  
17:00:42 19 in fact, the underwriters did not conduct a reasonable  
17:00:47 20 investigation, show me where that is in any of your  
17:00:49 21 reports in this case.  
17:00:51 22 A. I don't know that I've stated that  
17:00:52 23 that way prior to this discussion here.  
17:00:56 24 Q. In fact, you haven't, correct?  
17:00:58 25 A. I don't recall whether I did or not.

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17:01:00 1 Q. Take a look at your opening report  
17:01:03 2 and your rebuttal report, and if you can find it, show  
17:01:06 3 me where it is.

17:01:07 4 MR. LEWIS: Did you have something  
17:01:08 5 else to say?

17:01:09 6 THE WITNESS: Yeah. I think in  
17:01:09 7 connection with the discussion we've been  
17:01:11 8 having is why this arose; that is, you asked  
17:01:13 9 these questions and I'm answering them. You  
17:01:15 10 asked if I had an opinion about that and I  
17:01:17 11 gave it to you.

17:01:18 12 My understanding is the way this  
17:01:21 13 works is that the defendants are afforded the  
17:01:24 14 opportunity to establish such a defense, and  
17:01:27 15 in my view, they have not done so, and that,  
17:01:30 16 from a legal perspective, may be where it  
17:01:33 17 ends. That's the area in which I was asked  
17:01:36 18 to opine and that's the area about which I  
17:01:39 19 have opined.

17:01:40 20 In the course of our conversation,  
17:01:42 21 then, I believe you asked me if I had an  
17:01:43 22 opinion about that and I said I do, but  
17:01:47 23 whether or not I offer that is a matter of  
17:01:50 24 what counsel decides to pursue.

15:53:01 25 BY MR. GLUCKOW:

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15:53:01 1 Q. Have you been asked to form an  
17:01:56 2 opinion on that question, that question being whether  
17:01:58 3 in your opinion the underwriters conducted a  
17:02:01 4 reasonable investigation?

17:02:06 5 A. I don't think I've been specifically  
17:02:24 6 asked so far to form that opinion. I think I've been  
17:02:29 7 asked to address the issue of whether the defendants  
17:02:33 8 established that. In the course of reviewing the  
17:02:37 9 materials that I've reviewed, based on what I've seen  
17:02:45 10 to date and as part of my work in determining whether  
17:02:48 11 the defendants have met their burden in that regard, I  
17:02:53 12 have formed an opinion about that but, again, I don't  
17:02:59 13 know if I will be asked about that and have not  
17:03:02 14 discussed that in that sense with counsel.

17:03:04 15 Q. What's your current understanding  
17:03:06 16 regarding whether you intend to offer an opinion at  
17:03:11 17 trial concerning whether the underwriters conducted a  
17:03:14 18 reasonable due diligence investigation?

17:03:18 19 MR. LEWIS: Objection, asked and  
17:03:19 20 answered.

17:03:20 21 THE WITNESS: I don't have a current  
17:03:21 22 understanding as to whether I would be asked  
17:03:23 23 that or not. What I've been asked so far is  
17:03:26 24 do I believe the defendants have established  
17:03:28 25 that they conducted such an investigation.

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17:03:34 1 It's -- I don't know whether I would be asked  
17:03:43 2 to go to the next step of your question and  
17:03:45 3 determine whether I have an opinion on  
17:03:48 4 whether the due diligence investigation was  
17:03:50 5 adequate or not.

17:03:52 6 BY MR. GLUCKOW:

17:03:52 7 Q. Just to be clear, you agree with me  
17:03:54 8 that in your two written opinions to date, you have  
17:03:57 9 not offered an opinion on that latter question,  
17:04:00 10 namely, whether in your opinion the underwriters  
17:04:02 11 conducted a reasonable due diligence investigation,  
17:04:05 12 correct?

17:04:05 13 MR. LEWIS: Objection to form; the  
17:04:07 14 documents speak for themselves.

17:04:07 15 THE WITNESS: I think that's  
17:04:11 16 correct, but I'll be glad to check them and  
17:04:13 17 see if I did say that or not.

17:04:14 18 BY MR. GLUCKOW:

17:04:14 19 Q. Only if you feel the need to. I'm  
17:04:16 20 quite sure you have not given that opinion, but if you  
17:04:20 21 want to be comfortable with that, please take your  
17:04:23 22 time to do so.

17:05:38 23 A. No, in the way we've been  
17:05:39 24 discussing, I have not offered that so far.

17:05:42 25 Q. Thank you.

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17:05:43 1 In terms of the materials  
17:05:45 2 considered, Mr. Bessette went over this with you a  
17:05:49 3 little bit and I won't take much time on it, but if  
17:05:49 4 you would turn to Page 6 of your initial report,  
17:05:53 5 Paragraph 11, in connection with the underwriters' due  
17:06:12 6 diligence, how did you decide what materials you  
17:06:16 7 wanted to review?  
17:06:34 8 A. I asked counsel what underwriter  
17:06:37 9 materials had been produced, if there was a document  
17:06:44 10 production, and what testimony there was on that  
17:06:46 11 topic, and they identified that for me as the  
17:06:51 12 deposition transcripts and the related exhibits.  
17:06:58 13 Q. Did counsel explain to you that  
17:07:03 14 there was, in fact, a separate underwriter production  
17:07:14 15 referred to in Mr. Necarsulmer's report which I know  
17:07:23 16 you've seen, UND1 through 11,636?  
17:07:23 17 MR. LEWIS: Objection to form.  
17:07:25 18 THE WITNESS: Yeah, there was -- we  
17:07:28 19 had some discussion about that, yes.  
17:07:30 20 BY MR. GLUCKOW:  
17:07:30 21 Q. What do you recall about the  
17:07:32 22 discussion?  
17:07:33 23 A. I asked what there was in the way of  
17:07:36 24 underwriter production. It was described to me there  
17:07:40 25 was some amount of it; I don't recall how it was

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17:07:43 1 characterized to me. I asked what it was and if  
17:07:58 2 anybody had gone through it, I believe. I don't  
17:08:09 3 recall specifically what we discussed about it beyond  
17:08:11 4 that. It was not a terribly long discussion about it.  
17:08:19 5 I don't recall who suggested it, but I came to the  
17:08:23 6 conclusion that I would see what it was that  
17:08:25 7 Mr. Necarsulmer produced from that document production  
17:08:29 8 to support his opinion, whatever it was going to be.

17:08:33 9 Q. As you sit here today, you have  
17:08:36 10 never received or reviewed the underwriters' document  
17:08:41 11 production in this case; is that correct?

17:08:42 12 MR. LEWIS: Objection to form.

17:08:44 13 THE WITNESS: It's probably correct  
17:08:46 14 with respect to all of it. I know there have  
17:08:49 15 been some documents with UND numbers on them  
17:08:54 16 and other documents referred to in deposition  
17:08:56 17 transcripts and that sort of thing, but I  
17:08:59 18 don't believe I have anywhere near the volume  
17:09:01 19 that I understand exists.

17:09:03 20 BY MR. GLUCKOW:

17:09:03 21 Q. In fact, at least according to the  
17:09:05 22 list on Page 11, the only UND documents you would have  
17:09:11 23 received from the underwriters' production would have  
17:09:13 24 been those marked as exhibits at depositions, correct?

17:09:19 25 A. From this list, that's correct, and

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17:09:21 1 I think that might be correct overall. I have seen  
17:09:26 2 some underwriter documents or documents that have UND  
17:09:31 3 markings on them that I don't recall necessarily being  
17:09:36 4 referenced in transcripts, but I haven't tried to  
17:09:39 5 match them up that way, so it may be that they are all  
17:09:42 6 deposition transcripts, I don't know that.

17:09:44 7 Q. In what connection did you see the  
17:09:46 8 documents with the UND on them where you think there's  
17:09:50 9 at least a possibility that they may not have been  
17:09:53 10 deposition transcripts?

17:09:55 11 A. Just in the normal course of  
17:09:57 12 reviewing materials in the litigation.

17:10:01 13 Q. You're not aware of any category of  
17:10:09 14 documents or information received from the  
17:10:11 15 underwriters' production, as you sit here now, other  
17:10:13 16 than those marked as deposition exhibits, correct?

17:10:34 17 THE WITNESS: Can I have that back?

17:10:35 18 (The pending question was read  
17:10:36 19 back.)

17:10:36 20 MR. LEWIS: Objection to form.

17:10:38 21 THE WITNESS: I think that's  
17:10:38 22 correct. I'm not aware underwriters'  
17:10:41 23 documents have been categorized otherwise.

17:10:44 24 BY MR. GLUCKOW:

17:10:44 25 Q. For example, I'm looking at your

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17:10:46 1 bullet point listed on Page 6 and I'm just trying to  
17:10:48 2 think is there any way that the underwriters' document  
17:10:51 3 production could be captured in any of those other  
17:10:53 4 bullet points, and I'm not able to come up with any  
17:10:56 5 way and I'm asking you whether you can. These are the  
17:11:03 6 materials that you considered, correct, at least as of  
17:11:07 7 the time of your initial report?

17:11:07 8 MR. LEWIS: Objection to form.

17:11:10 9 THE WITNESS: No, I think you're  
17:11:12 10 correct, and as we discussed earlier.

17:11:15 11 BY MR. GLUCKOW:

17:11:15 12 Q. What about the underwriters'  
17:11:29 13 responses and objections to the plaintiff's sixth set  
17:11:35 14 of interrogatories, which were the underwriters'  
17:11:38 15 responses to the plaintiff's so-called contention  
17:11:42 16 interrogatories? Those are not listed here. Have you  
17:11:45 17 ever reviewed those, to your knowledge?

17:11:46 18 MR. LEWIS: Objection to form.

17:11:55 19 THE WITNESS: I don't recall,  
17:11:57 20 specifically. There is at least one set of  
17:12:02 21 interrogatory answers that I have reviewed.  
17:12:04 22 I do not recall off the top of my head if  
17:12:06 23 those are underwriters or not.

17:12:08 24 BY MR. GLUCKOW:

17:12:08 25 Q. Are those interrogatory answers that

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17:12:12 1 you're thinking of listed in the materials that you've  
17:12:15 2 considered in any of your reports?  
17:12:28 3 A. No.  
17:13:03 4 MR. GLUCKOW: Can we mark this,  
17:13:05 5 please.  
17:13:05 6 (Document Bates Stamped  
17:13:05 7 MIL 00090-00115 was marked Exhibit-352 for  
17:13:05 8 identification.)  
15:53:01 9 BY MR. GLUCKOW:  
15:53:01 10 Q. I'm handing you what's been marked  
17:13:10 11 as 352; it's from your production in this matter. Is  
17:13:13 12 that the set of interrogatory responses you had in  
17:13:15 13 mind?  
17:13:35 14 A. Yeah, I believe it is.  
17:13:41 15 Q. Those are the Adams Golf defendants'  
17:13:45 16 responses to the plaintiff's fifth set of  
17:13:47 17 interrogatories, correct?  
17:13:51 18 A. Correct.  
17:13:52 19 Q. Then to the best of your knowledge,  
17:14:00 20 you have not reviewed the underwriters' responses and  
17:14:03 21 objections to the plaintiff's sixth set of  
17:14:05 22 interrogatories, correct?  
17:14:12 23 A. Yeah, I think that's correct.  
17:14:14 24 Q. Did you review the depositions of  
17:14:17 25 the underwriter witnesses?

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17:14:18 1 A. I did.  
17:14:19 2 Q. Did you review specifically the  
17:14:22 3 deposition transcript of Olga Pulido-Crowe?  
17:14:27 4 A. I did.  
17:14:28 5 Q. Did you read the entire transcript  
17:14:30 6 or just selected portions?  
17:14:32 7 A. No, I read it all.  
17:14:32 8 Q. Did you read the exhibits that were  
17:14:35 9 referred to during that deposition?  
17:14:37 10 A. Yes.  
17:14:37 11 Q. In your rebuttal report, 335,  
17:15:01 12 Pages 22 to 23 address Mr. Necarsulmer's report?  
17:15:07 13 A. Right.  
17:15:15 14 Q. I'm going to ask you the same  
17:15:17 15 question I asked you about your initial report, which  
17:15:20 16 is your best estimate for the amount of time it took  
17:15:23 17 you to draft Paragraphs 23, 24, and 25 of the rebuttal  
17:15:35 18 report.  
17:15:37 19 MR. LEWIS: Objection to the form.  
17:16:51 20 THE WITNESS: In this connection, I  
17:17:00 21 read Mr. Necarsulmer's report, I reviewed  
17:17:04 22 Ms. Pulido-Crowe's transcript, I reviewed  
17:17:09 23 Mr. Walravens' transcript or -- I think prior  
17:17:17 24 to writing this report, I skimmed  
17:17:19 25 Mr. Walravens' transcript and reviewed the

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17:17:27 1 exhibits from the reports -- the transcripts,  
17:17:31 2 I'm sorry. I think I had a conversation with  
17:17:59 3 counsel as to whether there was any factual  
17:18:04 4 information I was missing in this context  
17:18:06 5 from what I had reviewed and then wrote this  
17:18:12 6 language, so that process may have taken five  
17:18:28 7 to 15 hours -- I'm trying to give you some  
17:18:37 8 decent estimate there -- maybe a little  
17:18:40 9 longer than that, somewhere in that  
17:18:44 10 neighborhood.

17:18:45 11 BY MR. GLUCKOW:

17:18:45 12 Q. I think you anticipated my next  
17:18:47 13 question because I believe the answer you just gave,  
17:18:49 14 five to 15 hours, somewhere in that neighborhood,  
17:18:52 15 maybe a little more than that, wasn't just in terms of  
17:18:54 16 drafting these paragraphs but also included the time  
17:18:56 17 you spent considering the issues discussed in those  
17:19:00 18 paragraphs, correct?

17:19:00 19 MR. LEWIS: Objection to form.

17:19:05 20 THE WITNESS: Right.

17:19:07 21 BY MR. GLUCKOW:

17:19:07 22 Q. In terms of that conversation with  
17:19:11 23 counsel you just mentioned, do you recall anything  
17:19:14 24 else about that other than what you testified to  
17:19:16 25 already?

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17:19:17 1 MR. LEWIS: Objection to form.  
17:19:20 2 THE WITNESS: No, it was a fairly  
17:19:22 3 brief conversation of the nature I said. I  
17:19:27 4 had summarized what I had observed existed,  
17:19:32 5 asked if there was anybody else involved in a  
17:19:39 6 significant way in the process, other  
17:19:40 7 information that might be missing of that  
17:19:42 8 type, and I think that was the nature of the  
17:19:44 9 conversation.  
17:19:44 10 BY MR. GLUCKOW:  
17:19:44 11 Q. What was the answer to that  
17:19:47 12 question?  
17:19:47 13 A. Basically, no.  
17:19:50 14 Q. The information that you had  
17:19:51 15 indicated that you had focused on already, if I  
17:19:55 16 understood your prior answers correctly, was the Olga  
17:19:58 17 Pulido-Crowe deposition transcript and the Walravens'  
17:20:02 18 transcript, correct?  
17:20:05 19 A. And the exhibits.  
17:20:06 20 Q. And the exhibits of those  
17:20:08 21 depositions?  
17:20:09 22 A. Yeah. I maybe get your question.  
17:20:14 23 That is the primary information I looked at related to  
17:20:16 24 this topic.  
17:20:17 25 Q. Can you think of any other category

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17:20:21 1 of information, other deposition transcripts, other  
17:20:25 2 documents that you looked at in connection with this  
17:20:29 3 portion of the assignment prior to submitting your  
17:20:32 4 rebuttal report?

17:20:32 5 MR. LEWIS: Objection, compound,  
17:20:34 6 vague.

17:20:43 7 THE WITNESS: Other than  
17:20:43 8 Mr. Necarsulmer's report, I don't believe so.

17:20:55 9 BY MR. GLUCKOW:

17:20:55 10 Q. Question on the drafting process,  
17:20:59 11 I'm going to try it with both the initial report and  
17:21:02 12 rebuttal report but I can break it up if we need to.

17:21:06 13 As I'm sure you know, there were a  
17:21:08 14 couple of drafts of each of your reports produced, I  
17:21:11 15 think two of the initial report and two of the  
17:21:13 16 rebuttal report, and there are some what I would  
17:21:15 17 characterize as minor language changes reflected when  
17:21:20 18 you compare the final version of the reports to the  
17:21:22 19 drafts that were produced. To the extent there are  
17:21:24 20 differences in the final version of the report versus  
17:21:27 21 the drafts, tell me how those changes occurred, and  
17:21:31 22 what I'm getting at is whether those changes occurred  
17:21:36 23 as a result of discussions with counsel, for example,  
17:21:38 24 or whether they occurred with you going back and  
17:21:40 25 looking at the document for a second or third or

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17:21:43 1 fourth time.

17:21:43 2 MR. LEWIS: Objection, compound,

17:21:44 3 vague.

17:21:45 4 THE WITNESS: I don't know if I can

17:21:46 5 do it that way, although I'd like to.

17:21:50 6 First off, I don't know what was

17:21:51 7 produced exactly, I haven't reviewed the

17:21:54 8 production of the drafts, but as I remember

17:21:55 9 the process, I produced a draft and tended to

17:22:05 10 review it myself as well as have

17:22:07 11 conversations with counsel about it.

17:22:09 12 Generally speaking, counsel's

17:22:12 13 contributions are in the area of grammar and

17:22:15 14 the English language, and that usually

17:22:20 15 additions or substantive changes are work

17:22:23 16 that I add. I could go through them and talk

17:22:27 17 about that, but that's generally the way this

17:22:29 18 process has worked and usually the way I

17:22:33 19 work.

17:22:33 20 BY MR. GLUCKOW:

17:22:33 21 Q. In this particular matter, do you

17:22:35 22 recall any substantive changes offered by counsel as

17:22:40 23 opposed to grammar or English language-type changes?

17:22:45 24 A. Let me see if I can tell that.

17:23:19 25 No, not with respect to the rebuttal

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17:23:27 1 report. It doesn't trigger any memory of substantive  
17:23:37 2 input from counsel.

17:23:40 3 Q. Fine; thank you.

17:23:42 4 I noticed in your production I

17:23:43 5 didn't see any notes. Did you keep any notes in

17:23:46 6 connection with your work in this matter?

17:23:48 7 A. No.

17:23:48 8 Q. Any specific reason why?

17:23:51 9 A. No, except in this matter there

17:23:58 10 weren't the source of documents and exhibits and items

17:24:05 11 like that on which I sometimes do take notes as backup

17:24:10 12 or work papers, for example, to a draft and that sort

17:24:13 13 of thing. Here, the drafts basically came out of the

17:24:18 14 review of the materials, and the drafts became the

17:24:20 15 result of what would have been notes otherwise.

17:24:33 16 MR. GLUCKOW: I'm going to mark the

17:24:35 17 AMF rebuttal report.

17:24:39 18 (Mr. Miller's AMF Rebuttal Report

17:24:39 19 was marked Exhibit-353 for identification.)

17:25:07 20 BY MR. GLUCKOW:

17:25:07 21 Q. Mr. Miller, I'm handing you

17:25:23 22 Exhibit-353, which is the rebuttal report that you

17:25:26 23 submitted in AMF. Do you recognize that?

17:25:31 24 A. It's coming back to me.

17:25:49 25 Q. Do you recall whether you used the

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17:25:51 1 AMF rebuttal report as a model or template for the  
17:25:56 2 rebuttal -- for the section of the rebuttal report in  
17:26:00 3 Adams Golf that dealt with the underwriters' due  
17:26:05 4 diligence question?

17:26:15 5 MR. LEWIS: Objection to form.

17:26:19 6 THE WITNESS: Actually, I don't  
17:26:23 7 think so. You asked me if I recall using it  
17:26:25 8 as a template; is that what you said?

15:53:01 9 BY MR. GLUCKOW:

15:53:01 10 Q. Did you make reference to the AMF  
17:26:30 11 rebuttal report in preparing the section of your  
17:26:33 12 rebuttal report in Adams Golf contained in  
17:26:37 13 Paragraphs 23, 24, 25?

17:26:45 14 A. The language is very similar. I do  
17:27:08 15 recall working from it. It was not -- the reason I'm  
17:27:12 16 hesitating on this, it was not a copy that looks like  
17:27:15 17 this (indicating). It was a copy of the text but not  
17:27:18 18 the heading and the report itself that I was working  
17:27:21 19 from, but the language is very similar, sure.

17:27:25 20 Q. In the materials considered portion  
17:27:32 21 of your rebuttal, and you have to go all the way back  
17:27:35 22 to Page 1 of your rebuttal, you mention in addition to  
17:27:41 23 what you reviewed in connection with your initial  
17:27:44 24 report, you had also reviewed the expert reports from  
17:27:48 25 the defendants, James, Sjoquist, Lynch, then Grace and

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17:27:57 1 Necarsulmer. I take it you don't recall reviewing any  
17:28:03 2 other materials in connection with the preparation of  
17:28:06 3 your rebuttal report?

17:28:11 4 MR. LEWIS: Objection to form.

17:28:12 5 THE WITNESS: I think that that's  
17:28:21 6 correct. I don't recall any other materials  
17:28:31 7 as I sit here.

17:28:35 8 BY MR. GLUCKOW:

17:28:35 9 Q. I'm going to hand you  
17:28:43 10 Mr. Necarsulmer's initial report, which has already  
17:28:48 11 been marked as 321 (indicating). Keep your rebuttal  
17:29:26 12 report open as well.

17:29:29 13 In the first two sentences of your  
17:29:32 14 Paragraph 23 in your rebuttal, you address in a  
17:29:38 15 general way the outline of responsibilities that  
17:29:40 16 Mr. Necarsulmer has provided. I take it you do not  
17:29:44 17 disagree with Mr. Necarsulmer's general outline of  
17:29:48 18 what underwriters are supposed to do as part of their  
17:29:51 19 due diligence; is that correct?

17:29:53 20 MR. LEWIS: Objection to form,  
17:29:54 21 foundation.

17:29:56 22 THE WITNESS: No, I don't think I  
17:30:54 23 have a problem with his outline. I think  
17:30:58 24 enough areas of it are general enough to  
17:31:05 25 cover most of the important areas you'd want.

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17:31:10 1 to get into.

17:31:11 2 BY MR. GLUCKOW:

17:31:11 3 Q. When you were responding to my

17:31:12 4 question, I'm assuming you were looking at 6A and 6B

17:31:15 5 of Mr. Necarsulmer's initial report where he provides

17:31:20 6 those general contours; is that correct?

17:31:22 7 MR. LEWIS: Objection to form.

17:31:23 8 THE WITNESS: Correct.

17:31:28 9 BY MR. GLUCKOW:

17:31:28 10 Q. Then on Pages 3 and 4,

17:31:32 11 Mr. Necarsulmer gives a list of 11 areas of activity

17:31:41 12 that he believes the underwriters undertook as part of

17:31:46 13 their due diligence. I take it you don't dispute that

17:31:52 14 the activities reflected in one through 11 actually

17:31:56 15 took place; is that correct?

17:31:57 16 MR. LEWIS: Objection to form and

17:31:59 17 foundation.

17:32:01 18 THE WITNESS: I'm sorry, could I

17:32:01 19 have the question back?

17:32:01 20 (The pending question was read

17:32:01 21 back.)

17:33:27 22 THE WITNESS: There's some judgment

17:33:29 23 calls in here so I'm not sure I can answer

17:33:35 24 it, the way I understand you're asking, that

17:33:39 25 is.

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17:33:40 1 BY MR. GLUCKOW:

17:33:40 2 Q. I'm sorry; go ahead.

17:33:42 3 A. Paragraph 1 on Page 3, it appears to

17:33:46 4 be Mr. Necarsulmer's opinion that the offering process

17:33:54 5 was staffed by a team of sufficient size, experience,

17:33:58 6 and seniority to be appropriate for the project; the

17:34:02 7 offering process was staffed by a team. He then makes

17:34:06 8 the judgment as to the rest of the sentence.

17:34:09 9 Q. Let's do it that way, then. Do you

17:34:11 10 disagree that the team was of sufficient size,

17:34:16 11 experience, and seniority to be appropriate to the

17:34:18 12 project or do you just not have an opinion one way or

17:34:25 13 the other on that, or do you agree?

17:34:29 14 A. First off, I think what I've said

17:34:37 15 about this is that his descriptions of these things

17:34:41 16 are extremely general. They don't refer to people,

17:34:46 17 describe their backgrounds, refer to documents

17:34:48 18 reviewed, information discovered, much more

17:34:53 19 importantly independent analysis performed by the

17:34:57 20 underwriters, investigation work, and that sort of

17:35:00 21 thing except in the most general terms, so you can't

17:35:03 22 tell from his presentation what was done to discharge

17:35:07 23 the obligation to conduct a reasonable investigation

17:35:10 24 to come to the conclusions that they came to.

17:35:17 25 That was, at least at the first

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17:35:20 1 instance, the level of information that I was  
17:35:26 2 responding to in my opinions, that is, that  
17:35:31 3 specifically with respect to the gray marketing issue,  
17:35:33 4 there's no mention of it in here, there's no  
17:35:39 5 indication that the issue was uncovered, discussed,  
17:35:45 6 analyzed, that independent information was obtained to  
17:35:50 7 evaluate it, that the impact of it was considered in  
17:35:54 8 any fashion, so I don't see where the generalities  
17:36:00 9 that Mr. Necarsulmer describes in these various  
17:36:03 10 categories established the adequacy of the  
17:36:09 11 investigation conducted by the underwriters in this  
17:36:13 12 matter.

17:36:13 13 Q. Are you finished?

17:36:16 14 A. Yeah, I think that responds to your  
17:36:19 15 question.

17:36:20 16 Q. Not at all. Move to strike.

17:36:22 17 MR. GLUCKOW: Read back my question.

17:36:22 18 (The preceding question was read  
17:36:22 19 back as follows:

17:34:09 20 Question: Let's do it that, way  
17:34:10 21 then. Do you disagree that the team was of  
17:34:15 22 sufficient size, experience, and seniority to  
17:34:17 23 be appropriate to the project or do you just  
17:34:23 24 not have an opinion one way or the other on  
17:34:25 25 that, or do you agree?)

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17:36:22 1 THE WITNESS: In terms of presenting  
17:36:54 2 a defense theory, it does not discuss the  
17:36:59 3 people, their backgrounds, their experience,  
17:37:02 4 why he thinks they were qualified, what work  
17:37:05 5 they did, how they were supervised, and that  
17:37:12 6 sort of thing. There's no information  
17:37:15 7 presented except the conclusion that he comes  
17:37:17 8 to.  
17:37:17 9 BY MR. GLUCKOW:  
17:37:17 10 Q. I'm asking you whether you agree  
17:37:19 11 with that conclusion or whether you haven't formed any  
17:37:23 12 opinion on it at all.  
17:37:24 13 MR. LEWIS: Objection to form,  
17:37:25 14 foundation, and scope of opinion.  
17:37:27 15 Go ahead.  
17:37:27 16 THE WITNESS: Regarding  
17:37:28 17 Mr. Necarsulmer's work, I was asked to  
17:37:32 18 determine if he established that the  
17:37:35 19 underwriters had conducted an adequate  
17:37:39 20 investigation as we've been discussing, and  
17:37:42 21 what I'm saying is with respect to  
17:37:45 22 Paragraph 1 specifically and then more  
17:37:46 23 generally the rest of this work, that he has  
17:37:50 24 not presented any information on which  
17:37:52 25 someone could make that determination. What

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17:37:54 1 he's presented is his conclusions as to those  
17:37:58 2 things.

17:37:59 3 BY MR. GLUCKOW:

17:37:59 4 Q. I understand that you're not happy  
17:38:01 5 with Mr. Necarsulmer's report, and that's fine, we'll  
17:38:04 6 deal with that. What I'm asking you is whether you  
17:38:07 7 have any opinion of your own regarding whether the  
17:38:11 8 offering process was staffed by a team of sufficient  
17:38:14 9 size, experience, and seniority to be appropriate for  
17:38:16 10 the project, and if you haven't formed an opinion on  
17:38:18 11 that, that's fine, just tell me that.

17:38:21 12 MR. LEWIS: Objection to form and  
17:38:22 13 foundation.

17:38:23 14 Go ahead.

17:38:24 15 THE WITNESS: I've had thoughts  
17:38:26 16 about that. I don't know that I've actually  
17:38:28 17 formed a formal opinion on that as you're  
17:38:32 18 asking me, as I think you may be asking me  
17:38:35 19 here.

17:38:37 20 My thoughts in that area have been  
17:38:43 21 that there was no managing director actually  
17:38:49 22 involved in the process, as far as I could  
17:38:51 23 tell. From the information I've reviewed so  
17:38:53 24 far, Mr. Francis was a figurehead whose  
17:38:56 25 fingerprints are not on the project, that

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17:39:01 1 Ms. Pulido-Crowe was hoping to become a  
17:39:05 2 managing director and was at the time -- I  
17:39:12 3 forget the next title, I think it was vice  
17:39:18 4 president -- conducting oversight on the  
17:39:19 5 work, much of which was delegated to  
17:39:22 6 Mr. Walravens and a financial analyst whose  
17:39:29 7 name, unfortunately, I can't recall, and that  
17:39:33 8 I'm not sure I saw any evidence of  
17:39:37 9 involvement by more senior personnel with  
17:39:40 10 perhaps more business experience and  
17:39:44 11 background with regard to critical issues  
17:39:48 12 such as gray marketing, and if the team had  
17:39:56 13 the experience to be appropriate for the  
17:40:01 14 project, I saw no evidence of inclination to  
17:40:09 15 perform independent analysis with respect to  
17:40:11 16 the gray market issue specifically from that  
17:40:15 17 team, which suggested either a lack of  
17:40:18 18 experience in the area or a simple failure to  
17:40:23 19 follow up on information that was obviously  
17:40:27 20 deserving of follow-up.  
17:40:28 21 BY MR. GLUCKOW:  
17:40:28 22 Q. You don't dispute that the  
17:40:31 23 underwriters had discussions with senior management at  
17:40:35 24 the company concerning the gray market issue, correct?  
17:40:38 25 MR. LEWIS: Objection to form.

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17:40:39 1 THE WITNESS: No, I don't dispute,  
17:40:41 2 from what I've seen, that they had  
17:40:43 3 discussions with a couple of management  
17:40:44 4 people about the topic.

17:40:45 5 BY MR. GLUCKOW:

17:40:45 6 Q. You don't dispute that the  
17:40:47 7 underwriters conducted telephone interviews with at  
17:40:56 8 least seven of Adams' top customers concerning a  
17:41:00 9 variety of topics, correct?

17:41:01 10 MR. LEWIS: Objection to form and  
17:41:02 11 foundation.

17:41:03 12 THE WITNESS: No, I don't dispute  
17:41:06 13 that from what I can see those interviews  
17:41:09 14 took place; no.

17:41:09 15 BY MR. GLUCKOW:

17:41:09 16 Q. Don't you consider those interviews  
17:41:11 17 an example of the kind of independent verification  
17:41:14 18 that you're referring to?

17:41:18 19 A. No. That is that the conduct of  
17:41:22 20 outside interviews absent management participation is  
17:41:25 21 important, but when no specific questioning is made  
17:41:31 22 about the gray marketing or the effect of gray  
17:41:33 23 marketing, more importantly, no contact was made with  
17:41:37 24 any of the people who had complained about gray  
17:41:40 25 marketing, no documentation or correspondence was

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17:41:42 1 reviewed with respect to the complaints about gray  
17:41:48 2 marketing, no independent follow-up was made to  
17:41:52 3 determine if it was a problem or what the impact of it  
17:41:55 4 was other than the assurance that I believe it was  
17:42:01 5 Mr. Adams gave to Ms. Pulido-Crowe with respect to  
17:42:06 6 Costco by saying don't pursue your own independent  
17:42:09 7 inquiry of Costco, I'll take care of them, or  
17:42:12 8 something to that effect, and/or Ms. Pulido-Crowe's  
17:42:18 9 assessment that since her husband wouldn't purchase  
17:42:22 10 sporting goods items at Costco, that it was not likely  
17:42:26 11 to be a threat to Adams Golf.

17:42:28 12 Those are what I remember about the  
17:42:29 13 disposition of the issue with management, but that  
17:42:32 14 seemed to end the inquiry, from what I can tell.

17:42:37 15 Q. One of the things you said in that  
17:42:40 16 answer was that there was no mention of the gray  
17:42:43 17 marketing issue in the customer surveys; is that  
17:42:43 18 correct?

17:42:48 19 A. Right.

17:42:48 20 Q. There was a specific question that  
17:42:49 21 said are there any other issues, legal, contractual,  
17:42:52 22 or otherwise, which you feel are important; isn't that  
17:42:58 23 correct?

17:42:58 24 MR. LEWIS: Objection to form.

17:42:59 25 THE WITNESS: I understand that was

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17:43:00 1 a question on the outline.

17:43:01 2 BY MR. GLUCKOW:

17:43:01 3 Q. You understand that was a question

17:43:03 4 that was asked of the customers who were interviewed

17:43:06 5 by the underwriters, correct?

17:43:10 6 A. I understood it was a question on

17:43:11 7 the outline to be asked. I don't recall reading

17:43:15 8 enough detail about the actual conversations to know

17:43:18 9 if it was asked or how it was asked or what the

17:43:22 10 inclination of the customer would have been to provide

17:43:25 11 the information over the telephone, what their

17:43:30 12 attitude toward Adams was at that point as a customer

17:43:35 13 trying to acquire a hot club in that market. I don't

17:43:41 14 know a lot of those things about the customer

17:43:44 15 interviews over the telephone.

17:43:45 16 Q. Did you review the actual record

17:43:49 17 reflecting the 11 interviews that the underwriters

17:43:53 18 conducted which show the responses received?

17:43:59 19 A. I saw at least some of that

17:44:01 20 information in some exhibits, yes.

17:44:03 21 Q. Isn't it true that in going through

17:44:06 22 each and every one of those 11 telephone interviews,

17:44:11 23 not a single one of the responses indicated any

17:44:14 24 concern about gray market or Costco?

17:44:17 25 MR. LEWIS: Objection to foundation

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17:44:20 1 and form; misstates the evidence.

17:44:23 2 THE WITNESS: I don't recall seeing

17:44:24 3 any mention in the responses of Costco or

17:44:35 4 gray marketing.

17:44:36 5 BY MR. GLUCKOW:

17:44:36 6 Q. Mr. Necarsulmer says, in his

17:44:40 7 rebuttal report which I know you've seen, these kinds

17:44:40 8 of interviews with independent parties are the type of

17:44:43 9 work underwriters should engage in to confirm

17:44:47 10 discussions with company management. Don't you agree

17:44:49 11 with that?

17:44:49 12 MR. LEWIS: Objection to form.

17:44:51 13 THE WITNESS: Again, as a general

17:44:53 14 category, I certainly agree that underwriters

17:44:56 15 should conduct independent interviews with

17:44:58 16 outside parties to confirm information they

17:45:02 17 have received from management. Whether or

17:45:05 18 not the way these were done, the basis of the

17:45:10 19 selection of the parties to interview, and

17:45:12 20 all those sorts of things were adequate are,

17:45:15 21 I think, question marks at this point in that

17:45:18 22 area.

17:45:19 23 BY MR. GLUCKOW:

17:45:19 24 Q. Again, the only deposition

17:45:26 25 transcripts of underwriters you can recall reading are

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17:45:30 1 Pulido-Crowe and Walravens', correct?

17:45:32 2 MR. LEWIS: Objection to form.

17:45:37 3 THE WITNESS: I believe that's

17:45:37 4 correct.

17:45:38 5 BY MR. GLUCKOW:

17:45:38 6 Q. You've never reviewed the

17:45:40 7 underwriters' document production in this case,

17:45:42 8 correct?

17:45:42 9 A. Other than those we've discussed.

17:45:43 10 Q. Other than as marked as exhibits at

17:45:45 11 depositions, correct?

17:45:46 12 A. I think that's correct.

17:45:48 13 Q. You referred to a conversation

17:45:51 14 between Pulido-Crowe and Mr. Adams regarding gray

17:45:56 15 marketing and Costco. Is it your understanding that

17:45:59 16 the only discussions that the underwriters had

17:46:02 17 concerning the gray market issue took place between

17:46:06 18 Ms. Pulido-Crowe and Mr. Adams?

17:46:10 19 MR. LEWIS: Objection to form.

17:46:11 20 THE WITNESS: No, I don't think

17:46:13 21 that's necessarily right. I think there were

17:46:15 22 conversations with one of the other

17:46:16 23 management people at least, maybe two others,

17:46:20 24 of the salespeople --

17:46:21 25 BY MR. GLUCKOW:

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17:46:21 1 Q. Gonsalves?

17:46:26 2 A. -- the sales executives, Gonsalves

17:46:26 3 and --

17:46:31 4 Q. Beebe?

17:46:31 5 A. -- possibly Beebe, about that topic.

17:46:37 6 Q. How many conversations are you aware

17:46:39 7 of between the underwriters and Adams' management

17:46:42 8 concerning the gray marketing or Costco issue?

17:46:49 9 A. As far as I can recall, I don't

17:46:57 10 recall reference to more than a few outside of the

17:47:03 11 Hoffman letter issue, if we can call it that, but with

17:47:08 12 respect to pursuing independent investigation and that

17:47:13 13 sort of thing, essentially none.

17:47:16 14 MR. LEWIS: I want to back up and

17:47:17 15 retroactively object to the question

17:47:18 16 suggesting that there was a conversation with

17:47:21 17 Beebe since the record does not reflect any

17:47:24 18 such conversation. It misstates --

17:47:32 19 MR. GLUCKOW: I disagree with your

17:47:35 20 characterization, but the record will speak

17:47:38 21 for itself.

17:47:39 22 BY MR. GLUCKOW:

17:47:39 23 Q. What's your basis for saying that

17:47:48 24 Mr. Francis's role was purely as a figurehead?

17:47:52 25 A. Ms. Pulido-Crowe's testimony to that

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17:47:59 1 effect.

17:47:59 2 Q. You take from Ms. Pulido-Crowe's

17:48:02 3 testimony that Francis was nothing more than a

17:48:05 4 figurehead?

17:48:06 5 A. In very shorthand form, yes --

17:48:08 6 Q. Do you have any other basis for

17:48:10 7 that?

17:48:10 8 MR. LEWIS: Please don't cut him

17:48:12 9 off.

17:48:12 10 BY MR. GLUCKOW:

17:48:12 11 Q. I'm sorry.

17:48:13 12 A. She described, as I recall, his

17:48:16 13 attendance at certain meetings, his fronting the

17:48:19 14 presentations to the commitment committee, and what I

17:48:19 15 would describe as more of a political role in the

17:48:23 16 process than a substantive role in an investigatory

17:48:31 17 way or anything of that nature.

17:48:32 18 Q. Any other basis for that statement?

17:48:35 19 MR. LEWIS: Objection to form and

17:48:42 20 foundation.

17:48:43 21 THE WITNESS: Only that in

17:48:45 22 discussing the functions that they were

17:48:48 23 performing, in the deposition I don't recall

17:48:52 24 either Pulido-Crowe or Walravens referring to

17:48:55 25 Francis having done anything in the process

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17:49:00 1 of conducting investigation or interviews or  
17:49:05 2 any of those sorts of functions other than,  
17:49:07 3 as Pulido-Crowe describes, in what I'll call  
17:49:11 4 a more political role.

17:49:13 5 BY MR. GLUCKOW:

17:49:13 6 Q. Is it your opinion the underwriters  
17:49:20 7 should have contacted Costco?

17:49:24 8 MR. LEWIS: Objection to form and  
17:49:25 9 foundation.

17:49:34 10 THE WITNESS: I don't know, I hadn't  
17:49:44 11 thought about that specifically, but I  
17:49:46 12 certainly think, backing up a step, in terms  
17:49:49 13 of generality they certainly should have  
17:49:51 14 investigated the Costco matter independently,  
17:49:54 15 whether that involved contacting Costco,  
17:49:57 16 which was certainly one possibility since  
17:50:01 17 Lehman Brothers appeared to have some entree  
17:50:05 18 to Costco, I don't recall specifically what  
17:50:08 19 that was, but contacting Costco directly  
17:50:10 20 seemed to be one choice, contacting an  
17:50:13 21 industry expert with knowledge of those types  
17:50:15 22 of things to conduct an independent analysis  
17:50:17 23 is another choice; there may have been  
17:50:20 24 different ways to accomplish that. I haven't  
17:50:24 25 thought further about how that should have

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17:50:26 1 been done, but something should have been  
17:50:28 2 done along those lines to pursue that issue.  
17:50:30 3 BY MR. GLUCKOW:  
17:50:30 4 Q. As you sit here today, what is it  
17:50:34 5 that you think needed to be done to have what, in your  
17:50:39 6 view, would have been a reasonable investigation?  
17:50:41 7 MR. LEWIS: Objection to form and  
17:50:44 8 foundation, compound, and we've been over a  
17:50:46 9 lot of this already.  
17:50:49 10 Go ahead.  
17:50:50 11 THE WITNESS: Again, that's an area  
17:51:04 12 I have not been asked for specific opinions  
17:51:06 13 on to this time. I have produced the opinion  
17:51:11 14 so far that Mr. Necarsulmer has not  
17:51:14 15 demonstrated that a reasonable and adequate  
17:51:18 16 investigation was performed, which is what I  
17:51:20 17 was asked to opine to in this area.  
17:51:23 18 Having conducted some analysis of  
17:51:26 19 this and reviewed the information we  
17:51:28 20 discussed so far today, I have reached some  
17:51:31 21 opinions about what I know so far appeared to  
17:51:40 22 have been done or not done, and that's the  
17:51:42 23 basis on which I am answering your questions  
17:51:45 24 now.  
17:51:45 25 In terms of what should have been

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17:51:47 1 done to conduct a reasonable investigation,  
17:51:50 2 at a minimum, the project should have been  
17:51:53 3 staffed sufficiently to ensure that somebody  
17:51:59 4 would take the responsibility to conduct an  
17:52:02 5 independent investigation of potential  
17:52:05 6 problem areas as they arose. The one I'm  
17:52:10 7 concerned about, obviously, is gray  
17:52:13 8 marketing.  
17:52:13 9 When that appeared to be an issue,  
17:52:19 10 based on the information that clubs were  
17:52:20 11 appearing in Costco, the underwriters should  
17:52:25 12 have conducted an independent investigation  
17:52:26 13 as to what that meant, what effect it was  
17:52:30 14 having on the retailers and distributors,  
17:52:32 15 what effect it was having on customers, how  
17:52:36 16 Costco was obtaining the clubs, whether it  
17:52:40 17 was likely to continue, what effect gray  
17:52:45 18 marketing had on companies that suffered from  
17:52:47 19 it.  
17:52:48 20 The red flag, I believe, had been  
17:52:53 21 raised once the underwriters obtained  
17:52:57 22 knowledge of the clubs' appearance in Costco.  
17:53:00 23 The issue had been raised by appearance in  
17:53:03 24 Callaway's 10-K and industry knowledge was  
17:53:11 25 available, according to Mr. Magnussen, about

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17:53:15 1 gray marketing, so it doesn't seem as though  
17:53:18 2 it should have been all that difficult to get  
17:53:20 3 into the industry and get information about  
17:53:24 4 that and, thereafter, determine what to do  
17:53:28 5 about it.

17:53:29 6 BY MR. GLUCKOW:

17:53:29 7 Q. Anything else, because we're going  
17:53:32 8 to go through each of these, but I want to know if  
17:53:37 9 there's anything else before we do?

17:53:39 10 MR. LEWIS: We're at five of six.  
17:53:41 11 We started nine hours ago, which is okay.  
17:53:45 12 We're all tired. The witness, I'm sure --  
17:53:48 13 I'm tired, at least. Maybe everybody else  
17:53:51 14 isn't, but I'm very tired. The witness is  
17:53:53 15 tired. We're very close, if not past, the  
17:53:56 16 seven-hour limit. I want to give you some  
17:53:59 17 leeway, but we're going to have to cut off at  
17:54:02 18 some point.

17:54:03 19 MR. GLUCKOW: If you're tired, the  
17:54:04 20 witness is tired, I'm happy to pick this up  
17:54:06 21 on Monday, but here's my point --

17:54:09 22 MR. LEWIS: We're not picking up  
17:54:11 23 Monday.

17:54:12 24 MR. GLUCKOW: That's fine, we'll  
17:54:12 25 just keep going; I'm not suggesting that we

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17:54:12 1 need to.

17:54:14 2 All I'm saying is you had as much

17:54:14 3 time as you needed with Mr. Necarsulmer,

17:54:18 4 right, and they had as much time as they

17:54:20 5 needed upstairs today with Mr. James.

17:54:21 6 MR. LEWIS: Right, but nobody has

17:54:23 7 gone past the seven-hour limit, as far as I'm

17:54:26 8 aware of, and that's established by the

17:54:27 9 rules. I'm not trying to be difficult about

17:54:29 10 it, but you don't get to go on until ten

17:54:32 11 o'clock because you have questions until ten

17:54:34 12 o'clock; you have your limit. I'm trying to

17:54:38 13 be flexible on it, but if you're not going to

17:54:40 14 be flexible with me and find a way to meet

17:54:41 15 some reasonable limit at this time of day,

17:54:43 16 then we're going to have to cut it off.

17:54:46 17 MR. GLUCKOW: I certainly intend to

17:54:47 18 be reasonable but I certainly also intend to

17:54:50 19 complete the examination, so hopefully that

17:54:53 20 will be something we can both live with.

17:54:55 21 MR. LEWIS: It's got to be pretty

17:54:58 22 soon.

17:55:08 23 BY MR. GLUCKOW:

17:55:08 24 Q. I think I was asking you was there

17:55:10 25 anything else before we go back through these items.

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17:55:44 1 A. I have not compared the outline of  
17:55:46 2 Mr. Necarsulmer in here with the paragraphs that I had  
17:55:50 3 submitted outlining an underwriter's responsibilities  
17:55:55 4 in the context of due diligence to see how his  
17:55:59 5 opinions stack up against those.

17:56:00 6 (Mr. Bessette leaves the  
17:56:00 7 deposition.)

17:56:00 8 (Mr. Collins enters the deposition.)

17:56:05 9 THE WITNESS: Without having done  
17:56:05 10 that, I think the additional red flag that  
17:56:08 11 exists in these materials, to those I've  
17:56:11 12 already discussed, would be in Paragraph 6,  
17:56:15 13 which --

17:56:16 14 BY MR. GLUCKOW:

17:56:16 15 Q. I'm sorry, Paragraph 6 of?

17:56:18 16 A. I'm sorry, Page 3 of

17:56:21 17 Mr. Necarsulmer, which refers to the commitment  
17:56:24 18 committee memo, I believe, which did have a line in it  
17:56:28 19 referring to the importance of maintaining margins, I  
17:56:31 20 believe it was, at Adams and how those could not be  
17:56:34 21 allowed to deteriorate or something to that effect,  
17:56:38 22 so, again, that identifies someone was aware of the  
17:56:41 23 general issue of margin maintenance but not in the  
17:56:44 24 specific wording of gray marketing.

17:56:46 25 Having said that, I think the answer

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17:56:49 1 I gave you previously probably covers at least the  
17:56:52 2 major areas of where I would be today on this issue  
17:56:55 3 since you raised it and asked me.  
17:56:58 4 Q. Can you think of any other areas? I  
17:57:00 5 don't want you to say that they're just the major  
17:57:01 6 ones. Can you think of any other areas as of today  
17:57:04 7 that you think would have required follow-through --  
17:57:06 8 MR. LEWIS: Objection.  
17:57:07 9 BY MR. GLUCKOW:  
17:57:07 10 Q. -- in your opinion?  
17:57:08 11 MR. LEWIS: Form, foundation, scope  
17:57:12 12 of the opinion.  
17:57:13 13 THE WITNESS: Again, I haven't been  
17:57:14 14 asked to form an opinion on that prior to  
17:57:17 15 this time and I've been giving you the  
17:57:20 16 thoughts I have in this area in response to  
17:57:23 17 your questions, and I think I hit on the  
17:57:25 18 major area, particularly with respect to gray  
17:57:28 19 marketing, and that being the lack of  
17:57:31 20 independent investigation by the underwriters  
17:57:33 21 of the issue and the willingness to accept  
17:57:36 22 Mr. Adams' assertion he would take care of  
17:57:39 23 the Costco problem and essentially leaving it  
17:57:44 24 at that, so I think that probably covers it  
17:57:46 25 with respect to that issue.

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17:57:48 1 I have not sat here and attempted to  
17:57:50 2 go beyond that and think about every other  
17:57:54 3 area they may have been deficient in their  
17:57:58 4 work, and have not been asked to do that to  
17:57:58 5 this point, but I think the major issue with  
17:58:01 6 respect to gray marketing would be covered by  
17:58:02 7 that topic.

17:58:04 8 BY MR. GLUCKOW:

17:58:04 9 Q. Putting aside the gray market issue  
17:58:10 10 or the Costco issue, however you want to phrase it,  
17:58:13 11 you're not offering any opinion that the underwriters'  
17:58:17 12 investigation was less than reasonable in any other  
17:58:22 13 way, are you? I've never heard you suggest otherwise.

17:58:24 14 MR. LEWIS: Objection to form,  
17:58:25 15 foundation, scope.

17:58:27 16 BY MR. GLUCKOW:

17:58:27 17 Q. Am I correct?

17:58:27 18 A. I haven't been asked that question.  
17:58:30 19 I haven't been asked to focus on areas other than gray  
17:58:36 20 marketing, so I couldn't answer that in that sense.

17:58:37 21 Q. The margins issue you mentioned  
17:58:39 22 before with respect to Paragraph 6 is reflected in the  
17:58:42 23 prospectus, correct?

17:58:45 24 A. Again, in a very general way, the  
17:58:49 25 issue of maintenance of sales price margin is

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17:58:51 1 mentioned in the prospectus, but that's all it says in  
17:58:55 2 the prospectus, is basically that one line.  
17:59:05 3 Q. Are you aware of Mr. Frazier's  
17:59:09 4 opinion, Professor Frazier's opinion, in this case?  
17:59:19 5 A. I don't believe so.  
17:59:19 6 Q. You haven't seen the transcript of  
17:59:22 7 his deposition from earlier this week?  
17:59:24 8 A. I have not.  
17:59:26 9 MR. LEWIS: In five minutes, I'm  
17:59:28 10 going to ask the court reporter to do a  
17:59:31 11 calculation of time for us so we can reach  
17:59:33 12 some conclusion here.  
17:59:33 13 BY MR. GLUCKOW:  
18:00:15 14 Q. I think we've confirmed this, but if  
18:00:18 15 you turn to Paragraph 25 on Page 23 of your rebuttal  
18:00:22 16 report, in the last sentence you state in your opinion  
18:00:36 17 the expert report of Mr. Necarsulmer does not meet the  
18:00:38 18 underwriters' burden to demonstrate that the  
18:00:43 19 investigation and/or resulting disclosures were  
18:00:45 20 reasonable and adequate, correct?  
18:00:47 21 A. Right.  
18:00:48 22 Q. You're not offering an opinion in  
18:00:52 23 this report, I think we've established, dealing with  
18:00:55 24 whether in your opinion the underwriters'  
18:00:58 25 investigation was reasonable, correct; you have not

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18:01:00 1 offered a written opinion on that question?

18:01:02 2 MR. LEWIS: Objection to form.

18:01:04 3 THE WITNESS: That's correct.

18:01:04 4 BY MR. GLUCKOW:

18:01:04 5 Q. What are your qualifications to

18:01:07 6 opine on whether Mr. Necarsulmer has met the

18:01:10 7 underwriters' burden?

18:01:12 8 MR. LEWIS: Objection to form,

18:01:13 9 foundation; calls for legal conclusion.

18:01:17 10 THE WITNESS: I think we've

18:01:20 11 discussed those earlier today at some length.

18:01:23 12 BY MR. GLUCKOW:

18:01:23 13 Q. You have nothing to add to the

18:01:26 14 qualifications that enable you to offer that opinion

18:01:28 15 other than what we talked about earlier?

18:01:30 16 MR. LEWIS: Objection to form,

18:01:31 17 foundation, legal conclusion.

18:01:34 18 THE WITNESS: Yeah, I think that's

18:01:39 19 probably correct in terms of background,

18:01:42 20 education, work experience, and that sort of

18:01:45 21 thing.

18:01:47 22 Having said that and having reviewed

18:01:49 23 the information that I've reviewed that we've

18:01:53 24 discussed, having reviewed Mr. Necarsulmer's

18:01:56 25 report, it's a fairly easy matter in the

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18:02:03 1 sense of reading the English language to  
18:02:09 2 determine that he has not presented the sort  
18:02:12 3 of information that one would need to present  
18:02:15 4 to meet the burden as outlined in my report  
18:02:19 5 and rebuttal report and as outlined in  
18:02:22 6 Mr. Necarsulmer's report as well.  
18:02:26 7 BY MR. GLUCKOW:  
18:02:26 8 Q. I take it you've never been a judge,  
18:02:30 9 correct?  
18:02:30 10 MR. LEWIS: Objection to form.  
18:02:31 11 THE WITNESS: Correct.  
18:02:32 12 BY MR. GLUCKOW:  
18:02:32 13 Q. Have you reviewed Mr. Necarsulmer's  
18:02:37 14 rebuttal report?  
18:02:38 15 A. Yes.  
18:02:39 16 Q. Have you considered the extent to  
18:02:51 17 which, if at all, Mr. Necarsulmer's rebuttal report  
18:02:53 18 alters the opinion that you've offered in your  
18:02:55 19 rebuttal report and your initial report?  
18:02:57 20 MR. LEWIS: Objection to form,  
18:02:59 21 foundation.  
18:03:01 22 THE WITNESS: I did, when I reviewed  
18:03:04 23 Mr. Necarsulmer's rebuttal report.  
18:03:06 24 BY MR. GLUCKOW:  
18:03:06 25 Q. And the results of that

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18:03:08 1 consideration?

18:03:09 2 A. I'd have to review that again

18:03:11 3 quickly to tell you.

18:03:13 4 Q. Sure. It's already been marked.

18:03:17 5 I'll hand you a copy. It's Exhibit-322 (indicating).

18:03:21 6 MR. LEWIS: While you're reviewing

18:03:23 7 that, Mr. Miller, let's have the court

18:03:24 8 reporter do the Herculean task of figuring

18:03:28 9 out how much time we have used.

18:05:07 10 THE COURT REPORTER: Seven and a

18:05:09 11 half hours of testimony.

18:05:15 12 MR. LEWIS: I'll let him answer your

18:05:17 13 last question.

18:05:17 14 MR. GLUCKOW: No, no, no.

18:05:17 15 MR. COLLINS: Let's go off the

18:05:17 16 record.

18:05:17 17 (Discussion held off the record.)

18:13:43 18 MR. GLUCKOW: Plaintiffs have

18:13:43 19 announced that in ten minutes this dep is

18:13:46 20 over in terms of defendant's questioning.

18:13:49 21 Defendants are reserving all their

18:13:51 22 rights but are happy to ask ten more minutes'

18:13:53 23 worth of questions.

18:13:58 24 MR. LEWIS: Let's also state on the

18:13:59 25 record that we have already been advised by

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18:14:02 1 the court reporter's calculations that we are  
18:14:05 2 at the seven-and-a-half-hour mark in terms of  
18:14:08 3 deposition time and it is late in the day and  
18:14:10 4 we did start somewhat earlier.

18:14:13 5 MR. GLUCKOW: I have said that I'm  
18:14:16 6 happy to come back if we need to and you had  
18:14:19 7 four hours with Mr. Necarsulmer and whatever  
18:14:22 8 with Mr. James.

18:14:23 9 Let's move on.

18:14:24 10 (The preceding question was read  
18:14:46 11 back.)

18:14:46 12 BY MR. GLUCKOW:

18:14:46 13 Q. Now that you have Mr. Necarsulmer's  
18:14:49 14 rebuttal report in front of you, Exhibit-322, we were  
18:14:52 15 discussing whether your review of the rebuttal report  
18:14:59 16 caused you to reconsider the opinions set forth in  
18:15:04 17 your own rebuttal report, that is, that  
18:15:06 18 Mr. Necarsulmer had not met the underwriters' burden  
18:15:11 19 to demonstrate that the investigation and/or resulting  
18:15:20 20 disclosures were reasonable and adequate.

18:15:22 21 MR. LEWIS: Objection to form.

18:15:25 22 THE WITNESS: It does not cause me  
18:15:27 23 to change my opinion.

18:15:29 24 BY MR. GLUCKOW:

18:15:29 25 Q. Why?

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18:15:30 1 MR. LEWIS: Objection to form,  
18:15:31 2 compound.  
18:15:32 3 THE WITNESS: Essentially, because  
18:15:33 4 there's nothing substantive added in  
18:15:35 5 Mr. Necarsulmer's rebuttal report.  
18:15:37 6 BY MR. GLUCKOW:  
18:15:37 7 Q. Did you review the various  
18:15:42 8 deposition testimony cited in Mr. Necarsulmer's  
18:15:44 9 rebuttal report?  
18:15:47 10 A. I reviewed some of that testimony.  
18:15:54 11 I reviewed Ms. Pulido-Crowe and Mr. Adams' deposition  
18:16:01 12 transcripts on those areas. I reviewed -- among this  
18:16:09 13 list, that was it.  
18:16:10 14 Q. Did you review the various documents  
18:16:13 15 with the UND prefix cited in Mr. Necarsulmer's  
18:16:17 16 rebuttal report?  
18:16:20 17 A. I did not, nor did I believe that  
18:16:39 18 would likely change my opinion.  
18:16:41 19 Q. Why is that?  
18:16:43 20 A. Because all this has to do with  
18:16:45 21 acceptance of management's assertions with respect to  
18:16:49 22 gray marketing and indicates no independent  
18:16:51 23 investigation by the underwriters and no contribution  
18:16:56 24 to that area beyond what existed in Mr. Necarsulmer's  
18:17:01 25 original report.

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18:17:02 1 Q. Notwithstanding 3C, which obviously  
18:17:05 2 refers to independent phone calls with third parties,  
18:17:09 3 correct?

18:17:10 4 MR. LEWIS: Object to the form.

18:17:11 5 THE WITNESS: Right, which we've  
18:17:13 6 already discussed today.

18:17:16 7 BY MR. GLUCKOW:

18:17:16 8 Q. Do you agree with Mr. Necarsulmer's  
18:17:20 9 statement in D on Page 2 that the reasonableness of  
18:17:25 10 underwriters' due diligence must be assessed based on  
18:17:29 11 the information that is reasonably available at the  
18:17:31 12 time of the offering?

18:17:31 13 MR. LEWIS: Objection to form,  
18:17:34 14 foundation, legal conclusion.

18:17:36 15 THE WITNESS: Sure.

18:17:41 16 BY MR. GLUCKOW:

18:17:41 17 Q. I assume you agree with  
18:17:44 18 Mr. Necarsulmer's statement in F that the mention of a  
18:17:48 19 risk in one issuer's filings is not necessarily  
18:17:55 20 determinative of whether the risk needs to be included  
18:17:58 21 in another issuing company's registration statement,  
18:18:02 22 correct?

18:18:05 23 MR. LEWIS: Objection to form,  
18:18:05 24 foundation.

18:18:07 25 THE WITNESS: I agree with it in

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18:18:08 1 exactly the limited way it is stated; that  
18:18:10 2 is, I agree that such an identification is  
18:18:11 3 not determinative of inclusion but certainly  
18:18:15 4 constitutes a red flag warranting  
18:18:18 5 investigation by the underwriter.

18:18:20 6 BY MR. GLUCKOW:

18:18:20 7 Q. Sitting here today, do you know  
18:18:22 8 whether the underwriters considered Callaway's 10-K  
18:18:28 9 disclosure that you mentioned earlier as part of their  
18:18:31 10 analysis?

18:18:32 11 MR. LEWIS: Objection to form and  
18:18:33 12 foundation.

18:18:34 13 THE WITNESS: Not specifically. I  
18:18:36 14 do recall thinking for some reason that they  
18:18:40 15 knew about it, but I don't remember why I  
18:18:42 16 think that.

18:18:43 17 BY MR. GLUCKOW:

18:18:43 18 Q. As you sit here today, you believe  
18:18:45 19 the underwriters were aware of the Callaway 10-K  
18:18:49 20 disclosure as part of the due diligence process?

18:18:54 21 MR. LEWIS: Objection;  
18:18:55 22 mischaracterizes his testimony.

18:18:56 23 THE WITNESS: I think that -- as  
18:18:58 24 best I recall, I remember thinking that they  
18:19:01 25 were, but like I said, I don't remember why I

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18:19:03 1 think that.

18:19:04 2 BY MR. GLUCKOW:

18:19:04 3 Q. You agree with the last sentence of

18:19:05 4 Mr. Necarsulmer's F, each factual situation is

18:19:08 5 different and the underwriters must evaluate

18:19:11 6 appropriate disclosure on an individual basis,

18:19:14 7 correct?

18:19:14 8 MR. LEWIS: Objection, form and

18:19:16 9 foundation.

18:19:16 10 THE WITNESS: Sure; I presume he's

18:19:17 11 talking about an individual company basis.

18:19:19 12 Sure, that makes sense.

18:19:20 13 BY MR. GLUCKOW:

18:19:20 14 Q. Do you agree with this statement:

18:19:22 15 The underwriters made their main inquiry concerning

18:19:26 16 gray marketing in the due diligence meetings in April

18:19:31 17 1998?

18:19:31 18 MR. LEWIS: Objection to form,

18:19:33 19 foundation.

18:19:45 20 THE WITNESS: I don't believe I have

18:19:49 21 an opinion on that.

18:19:50 22 BY MR. GLUCKOW:

18:19:50 23 Q. Explain what you mean by that.

18:19:59 24 MR. LEWIS: Objection.

18:20:01 25 THE WITNESS: I haven't attempted to

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18:20:04 1 determine or rank the level of inquiry that  
18:20:09 2 they made in such a fashion that I would make  
18:20:12 3 a statement that way. That does appear to be  
18:20:16 4 when the topic arose. Subsequent to that, I  
18:20:21 5 didn't see any indication that there was  
18:20:23 6 independent investigation done of that topic.  
18:20:28 7 It ended up not appearing in the prospectus,  
18:20:35 8 so I don't have any reason to not think that  
18:20:36 9 was the case, but I also don't -- I have not  
18:20:40 10 looked into that as an issue in itself to be  
18:20:42 11 able to say it that way; I wouldn't have  
18:20:45 12 thought of putting it that way. I also don't  
18:20:48 13 have any reason to question it. I haven't  
18:20:51 14 seen any indication to the contrary.

18:20:52 15 BY MR. GLUCKOW:

18:20:52 16 Q. Do you know whether there were  
18:20:53 17 discussions concerning the gray marketing issue  
18:20:56 18 between the underwriters and Adams' management in  
18:20:59 19 June 1998?

18:21:01 20 MR. LEWIS: Objection to form,  
18:21:03 21 foundation.

18:21:04 22 THE WITNESS: Yeah, I think we  
18:21:06 23 discussed that briefly earlier in connection  
18:21:08 24 with the Hoffman letter, was what I remember  
18:21:10 25 that being about, in June.

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18:21:14 1 BY MR. GLUCKOW:

18:21:14 2 Q. Do you know whether there were any  
18:21:16 3 discussions between the underwriters and Adams'  
18:21:19 4 management concerning gray marketing or Costco in  
18:21:22 5 connection with the Adams' press release in early June  
18:21:26 6 concerning the Costco issue?

18:21:27 7 MR. LEWIS: Object to the form.

18:21:29 8 THE WITNESS: Again, I recall that  
18:21:30 9 there was some discussion about that in  
18:21:33 10 connection with the Costco issue as presented  
18:21:36 11 in the press release and limited to that as  
18:21:39 12 opposed to the overall problem of gray  
18:21:43 13 marketing and sale of clubs through Costco  
18:21:44 14 and the implications that that had for the  
18:21:44 15 company.

18:21:47 16 BY MR. GLUCKOW:

18:21:47 17 Q. What's the basis for your last  
18:21:49 18 answer?18:21:49 19 A. My understanding of the conversation  
18:21:51 20 -- the conversations that occurred around the Hoffman  
18:21:56 21 letter with respect to addressing the SEC's inquiry  
18:22:01 22 about whether the issue discussed in the Hoffman  
18:22:06 23 letter had been investigated or examined by the  
18:22:13 24 company according to materiality standard.

18:22:17 25 MR. LEWIS: We have to shut it down.

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18:22:19 1 at this point. We're just at the time  
18:22:22 2 lengths -- we're way past. This was  
18:22:26 3 scheduled in this fashion at your guy's  
18:22:28 4 request. There was no anticipation of going  
18:22:30 5 after six o'clock on a Friday afternoon. We  
18:22:33 6 all have different plans and travel plans.  
18:22:36 7 I have one question, possibly the  
18:22:39 8 famous one question, for Mr. Miller to get on  
18:22:44 9 the record before we terminate.  
18:22:45 10 MR. GLUCKOW: I'm going to object to  
18:22:47 11 your shutting down the deposition because I  
18:22:49 12 have not finished my examination, and I will  
18:22:51 13 reserve all my rights.  
18:22:54 14 MR. COLLINS: Any idea how much  
18:22:55 15 more? We've been through this before and  
18:22:57 16 asked you that question.  
18:22:59 17 MR. GLUCKOW: Part of the problem is  
18:23:03 18 every time I ask more questions, I'm getting  
18:23:05 19 new opinions from the witness that are not  
18:23:07 20 reflected in his written opinions in the  
18:23:10 21 case.  
18:23:10 22 MR. LEWIS: Because you're asking  
18:23:12 23 him for them, you're asking what opinions he  
18:23:13 24 may have formed aside of the opinions that he  
18:23:18 25 has been engaged to express, and so if you

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18:23:22 1 keep asking someone for views they have, it's  
18:23:25 2 not going to be surprising if they have  
18:23:25 3 views.

18:23:29 4 MR. GLUCKOW: If you were willing to  
18:23:31 5 tell me he isn't going to offer any opinions  
18:23:32 6 concerning the underwriters' due diligence  
18:23:32 7 beyond that which is contained in his written  
18:23:35 8 reports, I told you a long time ago this  
18:23:38 9 could have been completed much sooner, but  
18:23:38 10 you won't give me that, and because you won't  
18:23:40 11 give me that, I need to know what opinions he  
18:23:42 12 has formed on that topic.

18:23:44 13 MR. LEWIS: You still haven't  
18:23:45 14 answered Todd's question of how much longer  
18:23:48 15 do you have to go. We're talking about  
18:23:50 16 travel arrangements at this point for people,  
18:23:52 17 including the witness.

18:23:55 18 MR. GLUCKOW: Quite honestly, based  
18:23:56 19 on this last exchange, I think I have  
18:23:59 20 probably another half an hour, at least.

18:24:04 21 MR. COLLINS: Why don't you proceed  
18:24:07 22 with your questioning.

18:24:10 23 BY MR. LEWIS:

18:24:11 24 Q. Mr. Miller, aside from the opinions  
18:24:15 25 that have been expressed in your various reports about

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ACKNOWLEDGMENT OF DEPONENT

I, R. Alan Miller, do hereby certify that I have read the foregoing pages and that the same is a correct transcription of the answers given by me to the questions therein propounded except for the corrections or changes in form or substance, if any, noted in the attached Errata Sheet.

9/22/06

Date

R. Alan Miller

Signature

Corrections to Deposition Transcript of R. Alan Miller IN RE ADAMS GOLF, INC. SECURITIES LITIGATION

<u>Page</u>	<u>Line</u>	<u>Now Reads</u>	<u>Should Read</u>	<u>Reason</u>
19	7, 8	to understanding the	to the understanding of the	mistranscribed
19	13,14	of understanding the	of the understanding of the	mistranscribed
20	20	forms	forums	mistranscribed
32	3	responsal	response or	mistranscribed
53	24	and	in	mistranscribed
54	14	previous time periods	that day	correction
114	21	are subject	are not subject	mistranscribed
130	1	Prompting	Promoting	mistranscribed
133	23	constrain	construct	mistranscribed
178	24	advisor	advice on	mistranscribed
207	12	THE WITNESS:	BY MR. BESSETTE:	mistranscribed
242	14	complaint	prospectus	mistranscribed
272	10	source	sorts	mistranscribed
285	4	correct.	correct, with respect to the corporate finance personnel.	clarification

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF DELAWARE

3    IN RE:    ADAMS GOLF, INC. :

4    SECURITIES LITIGATION   :

5                   X

6

7                   The Expert Discovery Deposition of  
8    CHRISTIANA OCHOA, taken in the above-entitled case  
9    before KATHLEEN J. PACULT, a Certified Shorthand  
10   Reporter within and for the County of Cook, State of  
11   Illinois, taken pursuant to the provisions of the  
12   Federal Rules of Civil Procedure and the Rules of  
13   the Supreme Court thereof pertaining to the taking  
14   of depositions for the purpose of discovery, taken  
15   on the 4th day of August 2006, at the hour of  
16   9:30 a.m., at 6100 North River Road, Rosemont,  
17   Illinois.

18

19

20

21

22

23

24

Page 2

1 A P P E A R A N C E S

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36 Defendants.

37

38

1 other conversations after that.

2 Q. In any of those -- well, strike that.

3 When Mr. Collins re-contacted you  
4 in the summer of this year and you were entertaining  
5 the thought of becoming an expert for the plaintiffs  
6 in this case, did you have to seek permission or  
7 consult with anybody at the university about whether  
8 you could do that or not?

9 A. I don't think I actually had to seek  
10 permission, but I did check to see whether I had to  
11 seek permission. I spoke with my -- with the  
12 associate dean at my law school. The dean at my law  
13 school was out of town and he made clear to me that  
14 it wasn't necessary to speak with her as well. I  
15 asked him what the issues -- what the constraints  
16 were on my serving as an expert, and he gave me  
17 those constraints.

18 Q. Now, you had not served as an expert  
19 witness in any sort of litigation prior to this  
20 engagement, is that right?

21 A. That's correct.

22 Q. Were you concerned during the process  
23 of talking with Mr. Mara or Mr. Collins about  
24 whether you would qualify as an expert witness?

1           A.       I wanted to make sure that the  
2        qualifications that I do possess were adequate and  
3        sufficient for their needs.

4           Q.       How did you do that?

5           A.       I made sure that they were entirely  
6        aware of the entirety of my knowledge of the gray  
7        market, my expertise in the gray market, and my  
8        expertise in other matters as well, and let them  
9        make their decision about that.

10          Q.       Did you express concern to the  
11        assistant dean or anybody at the university when you  
12        were inquiring about the constraints about whether  
13        or not you qualified as an expert?

14            MR. COLLINS: Foundation.

15            You may answer.

16    BY THE WITNESS:

17          A.       No.

18    BY MR. BESSETTE:

19          Q.       Did you consult with anybody -- other  
20        than the plaintiffs in this case, Mr. Collins or Mr.  
21        Mara, about whether -- well, did you express to  
22        anybody, other than Mr. Collins or Mr. Mara,  
23        thoughts about whether you qualified as an expert in  
24        this case?

1 You are currently an associate  
2 professor of law at Indiana University School of  
3 Law?

4 A. That's correct.

5 Q. And as I understand it, you say in the  
6 report or in your resume that your duties are  
7 divided into three sort of buckets or categories?

8 A. Yes.

9                   Q.        Okay.  Would you tell me what those  
10          are, please?

11                   A.        Those are teaching, research and  
12       service.

13 Q. Okay. What are your primary duties  
14 with respect to the research prong of your duties?

15 A. To research and publish my work.

16 O. And what work?

17           A.        I guess I am curious about what you  
18        mean by what work.

19 Q. I just want to understand what you  
20 meant, research and publish your work.

21 A. Yeah. It is law professors typically  
22 write legal scholarship articles, they are published  
23 in various law journals, as well as other locations.  
24 And we are expected to produce in that way.

1 of that course with that section in it was on the  
2 internet and that's how the plaintiff's lawyers  
3 found you?

4 A. That's what I understand.

5 Q. Okay. Now, explain to me, this course  
6 that you teach, international business transactions,  
7 is that a course for one semester?

8 A. Yes.

9 Q. And this is at the law school?

10 A. Correct.

11 Q. Which level of student?

12 A. Upper level students.

13 Q. So second and third years?

14 A. Correct. And also graduate students.

15 Q. What are the -- I mean, is there a  
16 textbook or multiple textbooks that you use to teach  
17 that class?

18 A. I teach from one textbook.

19 Q. Which one is that?

20 A. It's Folsom, Gordon and Spanogle  
21 International Business Transaction. Folsom is  
22 F-o-l-s-o-m, Gordon is Gordon, and Spanogle I  
23 believe is S-p-a-n-g -- S-p-a-n-o-g-l-e.

24 Q. And is there one or more chapters in

1 that textbook that deals with gray marketing?

2 A. There is one chapter that deals with  
3 counterfeiting and gray marketing. Let me rephrase.  
4 There are chapters in the book, the chapters are  
5 divided into what the authors call problems or  
6 sections, and one of those is devoted to gray  
7 marketing and counterfeiting.

8 Q. Okay. And how extensive is that  
9 section or chapter? In other words, how many pages?

10 MR. COLLINS: The document speaks for  
11 itself, and as you know, was produced.

12 BY THE WITNESS:

13 A. I don't remember exactly the page  
14 length.

15 BY MR. BESSETTE:

16 Q. Did you select that course book for  
17 that class?

18 A. I did.

19 Q. How did you select that? What was  
20 your criteria?

21 A. I used a few criteria. I selected  
22 it -- I taught international business transactions  
23 the first year that I taught at the law school, and  
24 went through a process that a new professor

1 typically goes through in selecting a course book  
2 and choosing that one.

3 Q. Okay. And would you just explain for  
4 the jury what that process is?

5 A. Sure. That process includes reviewing  
6 the world of possible international business  
7 transactions textbooks, looking at them seeing which  
8 ones has materials that you think are presented  
9 clearly, neatly, in a way that is well organized,  
10 easy to understand and will capture the students'  
11 attention.

12 In addition, I spoke with other  
13 professors who I knew had taught in the area before  
14 and asked them about their experiences in teaching  
15 international business transactions and the  
16 textbooks that they had used and the problems and  
17 the benefits that they had encountered with each of  
18 them.

19 Q. Now, only one section in that course  
20 book is devoted to gray marketing. Do I have that  
21 right?

22 A. Yes.

23 Q. And do the materials in that section  
24 deal with the golf industry exclusively or just sort

1           A.       They have been changed over the course  
2        of the time that I have taught the class. I have  
3        now taught the class three times. Each year I  
4        believe they have been slightly different, those  
5        materials have been slightly different. So in  
6        preparation for teaching each year, I reevaluate  
7        and -- I reevaluate the materials I have used before  
8        and add or subtract materials that were included.

9           Q.       So the course book itself doesn't have  
10       a section on gray materials as it deals with the  
11       golf industry, it is the supplemental materials. Do  
12       I understand that right?

13          A.       It is has a section on the gray  
14       market. It does not have a section on the gray  
15       market in relation to the golf industry.

16          Q.       Okay. And when you first started  
17       teaching, is it your understanding that in the first  
18       year, which I guess we'll get to here, '03 maybe,  
19       you provided supplemental materials that focused on  
20       gray marketing in the golf industry?

21                    MR. COLLINS: Asked and answered.

22                    Go ahead.

23        BY THE WITNESS:

24          A.       In the first year that I taught the

1 course, I did include those materials, yes.

2 BY MR. BESSETTE:

3 Q. I'm sorry, you did?

4 A. I did include those materials, yes.

5 Q. Okay. Now, where did you find those  
6 materials?

7 MR. COLLINS: And we're asking  
8 specifically with regard to the first year?

9 MR. BESSETTE: Right.

10 BY THE WITNESS:

11 A. The first year that I taught the  
12 class, again, I followed pretty standard practice  
13 for new professors. I used materials that a person  
14 who had taught international business transactions  
15 introduced me to.

16 BY MR. BESSETTE:

17 Q. And the supplemental materials that  
18 you used starting in '03 and continuing to the  
19 present have been produced?

20 A. Yes. I believe. And materials that I  
21 taught the last time that I taught have been  
22 produced.

23 Q. Do you have in your possession the  
24 materials starting from the first time you taught to